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ANALYSIS OF BUSINESS LOTTERIES AND PROMOTIONS IN NEBRASKA

Clarence A. H. Meyer*

The most frequent inquiry received by the Attorney General of Nebraska relates to the law on lotteries. Although this officer is authorized by statute to give opinions only to state officers and county attorneys, the questions from other sources are answered as well as circumstances will permit. The scope of the answers is necessarily limited unless the request originates with a county attorney. The office of the Attorney General never gives outright written approval of a particular scheme since the scheme in operation may vary in some significant detail. Also, promoters do not hesitate in using reproductions of official approval to promote their schemes. Neither will the office advise how a given scheme, if illegal, can be altered to comply with the lottery law.

Enforcement of the lottery statutes is, of course, a continuing problem. Complaints received by the Attorney General are normally forwarded to the county attorney concerned. Such complaints most frequently originate with fellow businessmen in the same or nearby towns who ask, "If he can do it, why can't I?" A gratifying proportion of the unlawful business promotion schemes which come to the attention of the Attorney General are undertaken by businessmen who are completely unaware that their plan involves a violation of the law, and who will immediately discontinue their promotion when this is called to their attention.

Several significant facts have come to the attention of the Attorney General's office because of a constant contact with lotteries employed in connection with business promotions. One of these is that many business leaders oppose the use of such schemes by merchants not only because they involve law violations, but also because such promotions serve in time to defeat their normal objective—an increase in patronage and profits. Their reasoning, based upon experience, is that as soon as one merchant initiates such a plan, his competitor must presently put on one just a little bigger, with more prizes. This situation progresses to the point where no one is able to make a normal profit.

The enforcement problem is greatest in October and November. People have money saved for holiday purchases, and businessmen feel that the first to get to them with the most attractive

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proposition will obtain their business. As to the desire to undertake this type of promotion, one businessman gave this explanation:

I can spend \$500 on advertising and get a nice increase in my business. But, I can take that same \$500, spend \$400 of it for prizes for a drawing, spend the other \$100 for advertising the drawing, and have customers lined up for a block waiting to get into my store.

It is the purpose of this article to outline briefly the principles followed in analyzing business promotions which come to the attention of the office. It is not intended as an exhaustive study of the subject.

I. Nebraska's Statute

The origin of Nebraska lottery laws can be traced to the Constitution of 1866 where it was provided that, "The legislature shall never authorize any lottery, or grant any divorce."¹ In the Constitution of 1875, the language was expanded to read, "The legislature shall not authorize any games of chance, lottery, or gift enterprise, under any pretense or for any purpose whatever."²

In the Constitutional Convention of 1920 there were no proposals to amend the lottery section, but in 1934 an amendment was adopted which deleted the words "under any pretense or for any purpose whatever" from the section as it had previously existed, and then added the provision which now permits pari-mutuel betting on horse races at licensed race tracks.³

Section 28-961⁴ is the basic section dealing with lotteries, and except for the proviso added in 1935 relative to horse racing, it has remained unchanged since 1873. It provides:

Whoever opens, sets on foot, carries on, promotes, makes or draws publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known; or by such ways and means exposes or sets to sale any house or houses, lands or real estate, or any goods or chattels, cash or written evidences of debt, or certificates of claims, or any thing or things of value whatever, shall be fined in any sum not exceeding five hundred dollars; Provided, however, that nothing herein shall be construed to apply to or prohibit wagering on the results of horse races by the pari-mutuel or certificate method when conducted by licensees within the race track enclosure at licensed horse race meetings.

¹ Neb. Const. Art. II, § 22 (1866).

² Neb. Const. Art. III, § 21 (1875).

³ Neb. Const. Art. III, § 24.

⁴ Neb. Rev. Stat. (Reissue 1948).

Section 28-962⁵ makes it an offense to sell lottery tickets, or to be in any way concerned in any lottery or scheme of chance. Section 28-963⁶ provides a fine not exceeding five hundred dollars for anyone who shall:

... publish an account of any lottery or scheme of chance of any kind or description, to be carried on, held or drawn, either out of or within the State of Nebraska... stating when or where the same is to be drawn, or the prizes therein or any of them, or any information in relation to such prizes... or in any way aiding or assisting in the same, or in any way giving publicity to such lottery or scheme of chance....

II. Elements Of A Lottery

The statutes proscribe but do not define a lottery. The Nebraska Supreme Court has declined to lay down an exact definition for the reason expressed in *State, ex rel. Hunter v. Omaha Motion Picture Exhibitors Association*:⁷

No sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition given.

However, in the same case, and in *State ex rel. Hunter v. Fox Beatrice Theatre Corporation*,⁸ the court adopted the rule which is probably more helpful and practical than a definition. This rule provides that a lottery must contain three elements: (1) prize, (2) chance and (3) consideration. All three elements must be present, or the lottery section has not been violated.

The first step is to analyze the promotion or scheme for these three elements. Normally at least two of the elements are clearly present, and the question narrows down to a determination of whether the facts warrant the conclusion that the third and fatal element is present. All business promotions having a lottery basis attempt to avoid, or sometimes evade, the lottery statutes by eliminating, minimizing or concealing one of the three elements.

A. PRIZE

The element of prize is of course always present in business promotion schemes. It is the necessary lure for inducing participation in the promotion, and its value is out of all proportion to the contribution made by the individual participant in the

⁵ Ibid.

⁶ Ibid.

⁷ 139 Neb. 312, 297 N.W. 547 (1941).

⁸ 133 Neb. 392, 275 N.W. 605 (1937).

scheme. However, the extent of that value is not important in determining the existence of a lottery. Anything of value given as a prize is sufficient. The court in *Baedar v. Caldwell*⁹ held one free game on a pinball machine was a thing of value.

B. CHANCE

In the majority of business promotions there is no attempt or desire to eliminate the element of chance. In the true contest, chance is of course not present. For example, the prize awarded a student for writing the best essay is not awarded on the basis of chance, but is given to him on the basis of his skill in preparing and presenting his subject. However, a business promoter normally is adverse to eliminating chance and substituting skill, because the widespread participation necessary for the success of a promotion cannot be obtained where substantial effort or services are required from participants. Thus the store operator who offered a \$200 cash prize to the individual who submitted the best essay on why Alaska should or should not be admitted as a state of the Union, would be able to interest only a small percentage of the people in his contest and would create little new traffic in his store, whereas the store operator who offered to give the same \$200 to the lucky winner of a drawing based upon the names of all who had registered at his store could expect an economically healthy influx of prospective new customers who were attracted by the possibility of getting something for nothing.

The English¹⁰ and American¹¹ courts state quite similarly the rule as to what degree of skill is required to remove a scheme from the purview of the lottery statute. The English courts, however, seem more willing to find the presence of the requisite element of skill than the American courts. The rule as generally stated by the American courts is stated by the Nebraska court in *Baedar v. Caldwell*:¹²

The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game.

⁹ 156 Neb. 489, 56 N.W.2d 706 (1953).

¹⁰ See *Scott v. Director of Public Prosecutions*, [1914] 2 K.B. 868.

¹¹ *Silfen v. City of Chicago*, 299 Ill. App. 117, 19 N.E.2d 640 (1939); *State v. Coats*, 158 Ore. 122, 74 P.2d 1102 (1938); *State ex rel. Igoe v. Joynt*, 341 Mo. 788, 110 S.W.2d 737 (1937); *State v. Hahn*, 105 Mont. 270, 72 P.2d 459 (1937); *Shapiro v. Moss*, 245 App. Div. 835, 281 N.Y.Supp. 72 (2d Dep't 1935), aff'd, 270 N.Y. 609, 1 N.E.2d 353 (1936); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 Pac. 1016 (1926); *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 71 N.E. 753 (1904).

¹² 156 Neb. 489, 493, 56 N.W.2d 706, 709 (1953).

The same case contains this test for determining the presence or absence of chance:

A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.¹³

In line with the foregoing test, it seems to be safe to conclude that very few persons are skilled and experienced in guessing the number of beans in a jar. On the other hand, there are other contests carried out along similar lines which do eliminate chance. Not long ago, the secretary of an association inquired whether it would be legal to give away a hog at a forthcoming annual meeting of a group of hog buyers, the prize to be given to the member who guessed the closest to the actual weight of the prize. Since the livelihood of those gentlemen depends upon their ability to estimate accurately not only the live weight of hogs, but also how they will dress out, it would only be reasonable to conclude that skill would be the determinant.

There has been one case in Nebraska where the court held that the element of chance was lacking in a particular promotion.¹⁴ The case involved the giving of trading stamps to customers based upon the amount of their purchase. The court held that since chance was not involved, an interpretation of the statute which would prohibit the giving of the stamps would be an unconstitutional interference with the right of a businessman to conduct his business as he chooses.

C. Consideration

Since promoters find it undesirable to eliminate either prize or chance, their only alternative is to attempt to eliminate, minimize, or conceal the third element, consideration, if their scheme of chance is to avoid the restrictive lottery law. Since the primary objective of such schemes is financial gain for the promoter or sponsor, the practical difficulties involved in attempting to remove or conceal consideration are readily apparent.

Determination of the presence or absence of consideration in a given scheme also presents several difficulties: (1) Is the legal definitions applied in contract law applicable? (2) Do the facts of the situation meet the definition agreed upon?

The courts are split on the legal definition of consideration in

¹³ Id. at 494, 56 N.W.2d at 709.

¹⁴ State ex rel. Hartigan v. Sperry & Hutchinson Co., 94 Neb. 785, 144 N.W. 795 (1913).

a lottery law. One group holds that consideration is not present unless the participant contributes money, property or services of a substantial nature in return for the right to participate, with some going so far as to say that the bank night schemes do not violate the lottery statutes.¹⁵ This view will be referred to as the *Yellow-Stone Kit* view.¹⁶ The other group adopts the contract definition of consideration: doing something, or agreeing to do something, which a person is not legally bound to do, or, refraining from doing something, or agreeing to refrain from doing something, which a person has a legal right to do.¹⁷ This will be referred to as the *Maughs v. Porter* view.¹⁸

In *Yellow-Stone Kit v. State*¹⁹ the proprietor gave free admissions to his medicine show. He also distributed chances without cost to all who attended his show. Medicine was sold between acts. The only fee charged at the show was for seats for those who did not care to stand, except at the final performance when a small admission charge was made. Holders of lucky numbers did not have to be present at the final performance when the drawing for the prizes was conducted. Even though the drawing was held and the prizes were awarded for the purpose of inducing a larger crowd to attend, with the expectation that they would buy medicine or pay for occupying a seat in the tent, the Alabama court held that consideration was absent and that no violation of the lottery laws was involved.

A Virginia court took a different approach in the case of *Maughs v. Porter*.²⁰ An auctioneer had advertised that a new

¹⁵ *People v. Cardas*, 137 Cal. App. 788, 28 P.2d 99 (1933); *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890).

¹⁶ *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890).

¹⁷ *State v. Hundley*, 220 Iowa 1369, 264 N.W. 608 (1936); *State v. Eames*, 87 N.Y. 477, 183 Atl. 590 (1936); *State v. Crescent Amusement Co.*, 170 Tenn. 351, 95 S.E.2d 310 (1936); *Maughs v. Porter*, 157 Va. 415, 161 S.E. 242 (1931).

¹⁸ 157 Va. 415, 161 S.E. 242 (1931).

¹⁹ 88 Ala. 196, 7 So. 338 (1890).

²⁰ 157 Va. 415, 161 S.E. 242 (1931). See *Affiliated Enterprise Inc. v. Gantz*, 86 F.2d 597 (10th Cir. 1936); *State v. Lynch*, 192 Okla. 497, 137 P.2d 949 (1943); *Furst v. A & G Amusement Co.*, 128 N.J.L. 311, 25 A.2d 892 (1942); *Stern v. Miner*, 239 Wis. 41, 300 N.W. 738 (1941); *Commonwealth v. Payne*, 307 Mass. 56, 29 N.E.2d 709 (1940); *State v. Jones*, 44 N.M. 623, 107 P.2d 344 (1940); *Affiliated Enterprises v. Waller*, 1 Terry 28, 5 A.2d 257 (Del. 1939); *State v. McEwan*, 343 Mo. 213, 120 S.W.2d 1098 (1938); *United-Detroit Theaters Corp. v. Colonial Theatrical Enterprise*, 280 Mich. 425, 273 N.W. 756 (1937); *State v. Fox Theatre Co.*, 144 Kan. 687, 62 P.2d 929 (1936); *City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 105 S.W.2d 595 (1936); *Willis v. Young* [1907] 1 K.B. 448.

car would be given away at a certain auction and that "every white person over the age of 16" could participate in the drawing, regardless of whether he bid or bought. In holding that mere attendance at the sale constituted sufficient consideration under the lottery laws, the Virginia court said:

... The object of the defendant unquestionably was to attract persons to the auction sale with the hope of deriving benefit from the crowd so augmented. Even though persons attracted by the advertisement of the free automobile might attend only because hoping to draw the automobile, and with the determination not to bid for any of the lots, some of these even might nevertheless be induced to bid after reaching the place of sale. So we conclude that the attendance of the plaintiff at the sale was a sufficient consideration for the promise to give an automobile, which could be enforced if otherwise legal.²¹

The Nebraska Supreme Court has not had an opportunity to pass upon all phases of the element of consideration. However, the language employed by the court in cases on the subject is of immense help in testing the many varied and ingenious schemes which come to the attention of the Attorney General.

The court held in *Chamber of Commerce v. Kieck*²² that consideration was present where merchants gave a coupon, good for a chance on a prize, with each 25 cent purchase. The court in *State ex rel. Hunter v. Fox Beatrice Theatre Corporation*²³ held that consideration was present where anyone could register at the theater on "bank-night," when a name was drawn by chance from among those who had registered. The winning name was announced both inside and outside the theater but the winner was required to appear within two minutes after the announcement. If the winner was outside the theater, he could enter without paying admission.

The court also held consideration to be present in *State ex rel. Hunter v. Omaha Motion Picture Exhibitors Association*.²⁴ This fact situation was substantially similar to the *Beatrice* case, except that registrants did not have to be present at the time of the drawing in order to win. Instead, they established their eligibility by means of a second temporary registration, which had to be made on a card at one of the participating theaters on the day of the scheduled drawing. No charge was made for either the first or second registration, and no admission ticket had to be purchased at any time.

²¹ *Maughs v. Porter*, 157 Va. 415, 420, 161 S.E. 242, 244 (1931).

²² 128 Neb. 13, 257 N.W. 493 (1934).

²³ 133 Neb. 392, 275 N.W. 605 (1937).

²⁴ 139 Neb. 312, 297 N.W. 547 (1941).

From these two cases it would appear that the Nebraska court has aligned with the cases following *Maughs v. Porter*.²⁵ Nebraska's apparent position is indicated by the following language of the court in the *Omaha Motion Picture* case:

... Its purpose is not to give away the prize as a gift. It is conceived in the hope of financial gain. It is merely an inducement to try one's luck in a gamble for comparatively large stakes. As a disguised lottery, pretending that it has all the virtues of good advertising, it attracts thousands of persons who would have nothing to do with it as an unmasked lottery.²⁶

A close examination reveals that the plan now before us is an evasion and not an avoidance of the law. Theoretical possibilities are not sufficient to overcome the practical effect of the plan. The contentions of the defendants are merely an advocacy that the letter of the law shall black out the spirit of the legislation.²⁷

There would seem to be no legal basis for distinguishing between movie operators and other merchants in holding registrations and conducting drawings. It so happens that the movie operator, the dance hall operator, and other businessmen in the entertainment field sell a product which cannot be removed from their business premises by the purchaser, but surely this distinction should not be a legal basis for placing them in a class separate and apart from businessmen who sell products which are normally carried away from their place of business. Since movie operators are barred from holding drawings, it would seem that other types of business should also be subject to the state statute.

Also, there is no basis for the contention that where the consideration is very slight, there is no violation of the statute. Either consideration is present, or it is not. It should not be the function of a prosecutor to decide how much consideration has to be present before it is "consideration" under the lottery laws. If that were to be the rule, then the task of determining presence or absence of consideration should more properly be allocated to some administrative board. Furthermore, no businessman should be placed in the position of having to guess how much consideration he can include in a promotion scheme without violating the criminal law. If the lottery statute were so uncertain, its constitutionality would be subject to attack under the rule that penal statutes must be sufficiently certain that men of ordinary intelligence are not required to guess at their meaning.²⁸

²⁵ 157 Va. 415, 161 S.E. 242 (1931).

²⁶ 139 Neb. 312, 316, 297 N.W. 547, 549 (1941).

²⁷ Id. at 317, 297 N.W. at 550.

²⁸ *Winters v. New York*, 333 U.S. 507 (1948).

A recent Oklahoma decision²⁹ rejected the "amount of consideration" test. The defendants were operators of gasoline service stations and were giving away automobiles under the following rules of the "contest:"

"All winners will be selected by drawing from the *ticket stubs deposited by the participants* in the containers maintained in Knox Serv-Ur-Self Stations and Stores.

... "1. Go into any Knox Service Station or Store and ask for a ticket. There is no cost. No purchase is required. There is no obligation, nothing to write; not a contest. Retain the ticket which you will be given. Place the stub in the container maintained in each station. This is all that is necessary to qualify you to win.

"2. Each ticket so received entitles you to one chance to win the 1952 Ford. You may receive and hold any number of tickets. "3. You do not need to be present at any drawing. The winning numbers will be posted in all Knox Service Stations and Stores. ... "30

Although the Oklahoma statute proscribes only those schemes where participants "have paid, or promised, or agreed to pay any valuable consideration for the chance of obtaining such property,"³¹ it was held that the service stations were operating a lottery. The court said:

... the rule requiring prospective participants to secure tickets in order to become eligible necessarily demands that such individuals appear at defendants' places of business. By such appearances they are, of course, subjected to the sales appeal of defendants assorted merchandise. That this works to defendants' benefit must be conceded....

... It is true defendants' plan does not require participants to appear and register to become eligible for the prize. Nevertheless, the rules do require any prospective participant to go to some Knox Service Station, or Store, and ask for a ticket. That this requires expenditure of time and inconvenience cannot be denied....

A second element of consideration present in this scheme is to be found in the fact all prospective participants are subjected to the sales appeal of the merchandise offered for sale at defendants' stores and station....³²

²⁹ Knox Industries Corp. v. State, 258 P.2d 910 (Okla. 1953).

³⁰ Id. at 911.

³¹ Okla. Stat. tit. 21, § 1051 (1951).

³² Knox Industries Corp. v. State, 258 P.2d 910, 914 (Okla. 1953).

III. *Promotions Held To Be Lotteries*

It may be of assistance to set out examples of some of the promotions which have been held by the Attorney General to be lotteries:

(1) One promotion which was popular around 1940, and a recent instance which came to the attention of the office, is the "Suit Club." A fixed number of individuals each pay one dollar a week to a clothing merchant and a drawing is held each week among the members. The winner of the drawing receives a suit without making any further payments.³³

(2) Guessing the number of beans in a jar, and all similar guessing schemes have been repeatedly held to fall within the ban.³⁴

(3) Cash register tapes on which the manufacturer of the tape has placed stars or other symbols at random intervals on the tape, with the purchaser receiving a refund of the amount of his purchase if his transaction happens to be recorded on a piece of the tape which bears one of the symbols.³⁵

(4) Door prizes are lottery schemes where any of those attending know in advance that such prizes will be given, and it is to the advantage of the sponsor to increase attendance.³⁶

(5) Included also are all types of drawings where the participants must go into the sponsor's place of business to register, be present at the time of the drawing, or perform some other chore in order to be eligible.³⁷

(6) So-called popularity contests where customers are issued "votes" on the basis of the amount of their purchases to be cast for their favorite candidate for the prizes.³⁸

(7) Giving a chance for a prize to each member of an organization if and when he pays his annual membership dues, or, giving a chance for a prize to membership solicitors for each membership they secured.³⁹

(8) A scheme whereby a service station issued cards similar to meal tickets, with the figures on the edge of the card totaling \$10. When the customer had his card completely punched out, showing that his purchases totalled \$10, he was entitled to lift a seal attached to the card indicating the amount of cash or mer-

³³ Rep. Att'y Gen. 954 (Neb. 1949-1950); Rep. Att'y Gen. 556, 561, 563 (Neb. 1939-1942).

³⁴ There are opinions given by the office and not reported in the formal reports of the Attorney General.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Rep. Att'y Gen. 556, 561, 563 (Neb. 1939-1942).

³⁸ *Supra* note 34.

³⁹ *Supra* note 34.

chandise he had "won." Amounts appearing under these seals were varied.⁴⁰

(9) Another promotion involved the giving of numbered coupons with each dollar purchase, with many coupons given away to any person who asked a merchant for them. The winner of the drawing was then asked to identify a song which was played over the radio, and if the correct answer was given, he received an automobile. If the correct answer was not given, another number was drawn and the process was repeated. In this case it is apparent that there was an attempt to inject the element of skill as a substitute for chance. Even if the musical selection played was something much more unfamiliar than "Jingle Bells," and actual skill or musical knowledge was necessary to identify the musical selection, a lottery still existed. The opportunity given to the winner of the drawing of identifying the mystery tune was in itself a thing of value, a prize, and therefore the lottery was complete before the music started.⁴¹

The above are only a few of the schemes which have been submitted for consideration. When they are held to fall within the lottery statute, an attempt is frequently made to achieve legality by varying some detail of operation, but invariably the three elements of prize, chance, and consideration are still hiding beneath the new veneer.

Conclusion

Although analysis of promotions to determine the presence or absence of a lottery presents a number of problems, enforcement is an even greater problem. It requires an almost constant and continuing effort. An additional complication for the individual states is the fact that the Post Office Department is changing its view of a lottery from the *Maughs v. Porter* rule to the *Yellow-Stone Kit* rule.⁴² This makes it possible for promoters to flood the mails with schemes which are considered lotteries in many states, but which the Post Office Department admits in the mails. The recent decision of the United States Supreme Court in *Federal Communications Commission v. American Broadcasting Co.*⁴³ has added more fuel to the flames. In that case the Court severely restricted the right of the Federal Communications Commission to bar certain types of radio and television "giveaway" shows, and in so doing it disposed of such cases as *Maughs v. Porter* with

⁴⁰ Supra note 34.

⁴¹ Supra note 34.

⁴² 39 Code Fed. Regs. § 72.17 (1949).

⁴³ 347 U.S. 284 (1954).

the assertion that "such cases differ substantially from the cases before us." It would appear that this decision will permit certain types of broadcasts which would be deemed violations of the lottery laws of many of the states. Promoters of this type of program will not delay in taking advantage of the decision.

In spite of the difficulties involved in enforcing the lottery laws in Nebraska, it would seem that if that law is unfair in its operation or is unpopular with the people, the proper remedy is to repeal or amend the law through legislative action, and not through administrative interpretation. If it is a bad law, proper enforcement will soon expose its defects and absurdities, and lead to the initiation of legislative reform.

Finally, it would seem that haphazard enforcement or disregarded of the law cannot be justified on the ground that most lottery schemes are harmless. Permitting "harmless" lotteries to be carried on allows the more insidious violator of the same statute to claim favoritism in enforcement of the law. A line cannot be drawn between a "good" lottery and a "bad" lottery.